No. 8306.

In the United States
Circuit Court of Appeals
For the Ninth Circuit.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO.),

Claimant and Appellant,

THE JAPANESE MOTORSHIP "KOYEI MARU", her motors, tackle, apparel and furniture,

Respondent,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Libelant and Appellee.

TAKACHIHO SHOSEN KABUSHIKI KAISHA LTD. (UNITED OCEAN TRANSPORT CO., LTD.),

Libelant and Appellant,

vs.

THE AMERICAN TUG "DAVID P. FLEMING", her motors, tackle, apparel and furniture, etc., and THE SCOWS P. S. B. & D. CO. NO. 13, PIONEER NO. 11 and W. T. CO. NO. 14,

Respondents,

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Claimant and Appellee.

PACIFIC VEGETABLE OIL CO., INC., a corporation, and five others, owners and consignees of cargo laden on board the Japanese Motorship "KOYEI MARU",

Libelants and Appellants,

vs.

WILMINGTON TRANSPORTATION COMPANY, a corporation,

Respondent and Appellee.

BRIEF ON BEHALF OF APPELLANTS, PACIFIC VEGETABLE OIL CO. INC. AND FIVE OTHERS. (CARGO INTERESTS.)

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TABLE OF AUTHORITIES CITED.

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BRIEF ON BEHALF OF APPELLANTS, PACIFIC VEGETABLE OIL CO. INC. AND FIVE OTHERS. (CARGO INTERESTS.)

On April 22, 1934, at 2:09 a. m., about one-half mile southeast of the light of the Los Angeles Harbor breakwater, a collision occurred between the Japanese motorship

"Koyei Maru", outward bound from Los Angeles Harbor, and the scow "Pioneer No. 11", one of a flotilla of three scows in tow of the tug "David P. Fleming".

Both the scow and the motorship suffered damage. The plates of the latter were punctured and one of the cargo compartments was flooded, whereby certain cargo therein was injured by salt water. The damage to the motorship necessitated her return to Los Angeles for examination and temporary repair. On this account certain expenses in the nature of general average were incurred, and thereafter a general average was stated and contributions were assessed against and paid by the interests of the owners of cargo on board the "Koyei Maru".

The appellee, Wilmington Transportation Company, filed a libel *in rem* against the "Koyei Maru" on account of the damage to the scow "Pioneer No. 11". The owner of the "Koyei Maru" filed a libel *in rem* against the tug "David P. Fleming" and the three scows for the damage suffered by the motorship. The appellants on behalf of whom this brief is written, Pacific Vegetable Oil Co. Inc. and five others, are the owners and consignees of cargo on board the "Koyei Maru", some of which was damaged as a result of the collision and all of which was required to contribute in general average to the expenses involved in the return of the motorship to Los Angeles and her temporary repair. These appellants filed a libel *in personam* against Wilmington Transportation Company, as operator of the tug and flotilla, to recover the cargo damage and general average contributions. The three suits were

consolidated for trial and were heard together. The trial court, by its decision in the consolidated cases, placed the blame for the collision on the "Koyei Maru", exonerated the tug and flotilla, and the operator thereof, and upon a single set of findings entered decrees sustaining the libel of the Wilmington Transportation Company and dismissing the libels of the "Koyei Maru's" owners and of the cargo interests on whose behalf this brief is written.

STATEMENT OF FACTS.

The following are the versions of the collision given by the witnesses for the respective vessels:

The "David P. Fleming's" Story.

The "David P. Fleming" is a 450-horsepower Diesel tug, 75 feet long and 17 feet beam. She was manned by a master, engineer, assistant engineer and deckhand. On the night of the collision and for some time prior thereto she had been engaged in towing scows between a quarry at Catalina Island and the new Long Beach breakwater, carrying rock for use in the construction of the breakwater. The practice was for the tug to pick up two or three empty scows at the breakwater, tow them to the quarry on the island, pick up loaded scows and return with them to the breakwater. The round voyage required from eighteen to twenty-six hours.

On the night of the collision the "David P. Fleming" left her berth in Wilmington about midnight and proceeded to a point inside the new breakwater, where three

empty scows were moored, awaiting her. Two of the scows were 110 feet long and 40 feet beam, and the third, the "Pioneer No. 11", was 130 feet long and 50 feet beam. The tow was made up with a 1200-foot hawser between the tug and one of the smaller scows, a 600-foot hawser between the latter and the "Pioneer No. 11", and a 600-foot hawser between the "Pioneer No. 11" and the third scow. The total length of the flotilla was in excess of 2800 feet. [Ap. 139-42.]

The "David P. Fleming" was equipped with electric lights and displayed red and green side lights, properly screened, a masthead and two towing lights, properly screened, a range light on the after mast, not screened and visible all around the horizon, and a stern light on the after end of the house. She also carried an electric searchlight located on the starboard side of the house, forward. [Ap. 143-8.] The tug was bound for the open sea, where the International Rules applied, and it is agreed by all concerned that liability for the collision must be determined by the International Rules rather than the Inland Rules. [Ap. 129.] The lights on the "David P. Fleming" admittedly did not comply with the International Rules applicable to vessels in her situation in several respects: (1) The towing lights were only three feet apart instead of six feet (Art. 3); (2) Her range light was less than three feet higher than the masthead light, instead of being at least fifteen feet higher (Art. 2-e); and (3) The range light was unscreened and visible all around the horizon (Art. 2-e). [Ap. 173, 231, 541, 593.]

Each of the scows displayed three kerosene lanterns, to-wit, red and green side lights fixed in frames and screened, and a white stern light screened to show from dead astern to six points on each side thereof. The lan-

terns on the scows were filled with oil, lighted and fixed in place by the tug's deckhand just prior to the departure of the flotilla. [Ap. 148-9, 211-13.]

No deckhand or other attendant was on any of the scows, the entire flotilla being manned by the four men who were at all times on the tug. It was never the practice to have men on the scows during a passage, whether the scows were loaded or empty, and there were no accommodations for an attendant thereon. [Ap. 199-200.] The scows, when empty, had a freeboard of nine or ten feet. [Ap. 203.] The speed of the flotilla, after getting under way, was from two and one-half to three miles an hour. [Ap. 150.]

At about 1:30 a. m. the flotilla got under way and proceeded westerly until the last scow cleared the westerly end of the new breakwater. The tug then turned to port and set a course due south by compass for Catalina. [Ap. 149-150.] This course crosses the entrance to the main channel of Los Angeles Harbor, and calls for passing the easterly end of the San Pedro breakwater, about one-half a mile to seaward thereof.

Shortly after the tug had passed the San Pedro breakwater light and approximately five or six minutes prior to the collision, the master of the tug saw the lights of a vessel, which proved to be the "Koyei Maru", across the top of the breakwater, well on his starboard hand. The "Koyei Maru" was coming out of the main channel and had not yet rounded the end of the breakwater. The tug's master continued to observe the vessel as she rounded the breakwater light and settled on a course pointing approximately toward the first scow in the tow. As the approaching vessel came abeam of the light, the tug's master blew

a series of short blasts on the tug's whistle. At that time he estimated the speed of the approaching vessel at from ten to twelve miles per hour. [Ap. 156-62.] The tug's master heard no reply to his danger signal so blew a second danger signal about a minute after the first. He still heard no response, and a third danger signal was blown a minute and a half after the second. Then the "Koyei Maru" blew three blasts and her speed seemed to slacken. The tug's master then turned on the tug's searchlight and directed the beam aft toward the scows. At about the same time he slowed down the tug, feeling that if he held his speed the "Koyei Maru" would strike the second scow, and hoping that by slackening speed he could cause the tow line to sink and the "Koyei Maru" would pass over it. The tug then blew a final danger signal. [Ap. 162-5.]

The "Koyei Maru" passed between the first and second scows. When her stern cleared the line of tow, the tug's captain rang up his engines, but the second and third scows did not follow. The tug then cast off the tow line and proceeded to the "Koyei Maru" to learn her name. Communication was attempted, but was unsuccessful on account of difference in language. The tug returned to the scows and found the tow line between the first and second scows parted about fifty feet forward of the pennant of the second scow and the planking of the second scow damaged on the forward starboard corner. The damaged scow was sent back to the harbor by another tug summoned by telephone, and the "David P. Fleming" proceeded to the island with the two undamaged scows. [Ap. 165-70.]

The three "David P. Fleming" witnesses, the master, engineer and deckhand, were emphatic that at all times

the side lights on the three scows were burning and that they observed them from time to time from the tug. They also testified that all lights on all the scows were burning after the collision.

The distances, courses, speeds and times noted by the tug's witnesses are admittedly estimates. No bearings were taken or times noted, except the time of the collision was fixed at 2:05 a. m. by the tug's clock. [Ap. 179.] The tug's master plotted his course from memory and former practice, and fixed the place of collision about three-quarters of a mile off the San Pedro breakwater light. His log book entry, made at the time, fixed the distance at one-half mile. [Ap. 184.]

The "Koyei Maru's" Story.

The "Koyei Maru" is a 10,000 deadweight ton single screw motor freighter. At about 1:30 a. m. on the night of the collision she left Berth 58, about one-third loaded, and bound for San Francisco. On the bridge were the port pilot, the vessel's master, Captain Watanabe, the third officer, and a quartermaster. On the forecastle head was the first officer, carpenter, boatswain and an apprentice seaman.

The vessel proceeded down the channel at slow speed, and at 1:55 a. m., abeam of the No. 2 bell buoy, she dropped the pilot. Shortly thereafter the second officer joined the others on the bridge. At 2:01 the engines were rung up to half speed, and shortly thereafter the vessel rounded the San Pedro breakwater light and steadied on a course SExE magnetic, with the breakwater light abeam and about 900 feet distant. [Ap. 343.]

At 2:04 a. m., just as the above course and position were established, the master and officers on the bridge observed, slightly on the starboard bow, a dim blur of light which appeared to be white, and on the port bow, bearing two and four points respectively, two very faint white lights. [Ap. 343-4.] When these lights were observed the "Koyei Maru's" speed was reduced from "half" to "slow", one blast of the whistle was sounded, and the course altered slightly to starboard. There was no response from the craft at starboard, and as the blur of light appeared to be broadening on the starboard bow the helm of the "Koyei Maru" was shifted to resume her original course. The master and the two officers watched the lights carefully, using their night glasses and binoculars, and all observed that the blur of light on the starboard continued to broaden to the right and the two lights on the port continued to broaden on the left. The lights observed were insufficient to identify the nature or courses of the craft carrying them, and the master believed them to be fishing boats. [Ap. 344-6.]

At 2:06 a. m. the blur of light to starboard resolved itself into two white lights, one above the other, and just forward of them the "Koyei Maru's" master and one of the officers observed the faint flicker of a green light. The master immediately interpreted the lights thus observed as a tug with something in tow. At the same time he discerned a low dark object ahead and very slightly on the starboard bow, which object turned out to be the first scow in the tow. No lights on this dark object were visible to any of those on the "Koyei Maru". The master thereupon sounded three blasts on the whistle, set the engines full astern, and ordered the rudder hard left, designing to go astern of the dark object, which he took to be the

tow of the tug, as indicated by the two lights and the green flash farther to starboard. As this maneuver was being executed a searchlight beam from the tug flashed out and was played upon the dark object. [Ap. 346-7.]

At this time the two lights to port had further broadened on the bow and now the bearing was three and six points respectively. They still appeared to be white. [Ap. 346-7.]

The bow of the "Koyei Maru" swung to port, astern of the dark object, and although the reversing screw tended to pull the vessel back to her former heading, it was obvious she would pass astern of the dark object now illuminated by the tug's searchlight.

At 2:08 a. m. the two lights on the port bow, which had theretofore appeared to be white, showed green, and the master of the "Koyei Maru" then realized that there was more than one craft in tow of the tug. He immediately ordered the port anchor dropped, shouting his command from the bridge to the men on the forecastle head. The anchor was immediately dropped. The reversing screw and the dropped anchor brought the "Koyei Maru" practically to a standstill in the water, but at 2:09 a. m. there was a collision between the "Koyei Maru" and the second scow, "Pioneer No. 11". The forward starboard corner of the scow struck the "Koyei Maru's" port side forward. [Ap. 348-50.]

Immediately after the collision the "Koyei Maru" raised her anchor and took a cross bearing which fixed the point of collision approximately 2700 feet ExS¼S magnetic from the breakwater light. The vessel's plates on the port side forward were found to be damaged and

soundings showed that she was making water. She therefore put about and returned to Los Angeles Harbor. [Ap. 152.]

At no time before or after the collision did any of the "Koyei Maru's" officers or other witnesses see any light whatsoever on the first scow of the tow,—the so-called dark object, which was first seen ahead of the vessel at 2:06 a. m. and which was thereupon illuminated by the tug's searchlight. The blur of lights to starboard, which ultimately resolved into two vertical white lights, was, of course, the unscreened range light and the stern light of the tug. The two lights on the port bow, which first appeared white and then green, turned out to be the side lights on the second and third scows.

At 2:06 a. m., when the blur of light to starboard separated into two vertical white lights accompanied by the flash of green, it of course indicated to the "Koyei Maru's" master a tug with *one* tow. It is obvious that the "David P. Fleming's" masthead light and actual towing lights could not be observed from the "Koyei Maru's" position on account of the screens, for if the tug's course had been such as to open the masthead and towing lights the "Koyei Maru" would have seen, not two vertical lights, but three. What the "Koyei Maru's" master did see was the tug's unscreened range light and the stern light beneath it, which made two vertical white lights and indicated one vessel in tow. This indication was fully borne out when the dark object loomed up ahead, and when the tug illuminated the dark object with its searchlight. It was not until 2:08, when the lights to port showed green, that anything indicated to the "Koyei Maru" that the tow was composed of more than one vessel.

The Decision of the Trial Court and the Errors Relied Upon by the Cargo Interests.

The elaborate findings signed by the court afford no fair indication of the court's views on many of the issues presented by the proofs. Those findings, prepared by counsel for the "David P. Fleming" interests, find categorically against the "Koyei Maru" and in favor of the "David P. Fleming" on every conceivable issue in the case. In the light of the undisputed evidence many of them are obviously absurd. The court's actual view of the situation will be found in the brief oral opinion given from the bench at the conclusion of the arguments. [Ap. 597-8.]

As one set of findings was made covering all three cases, and all the appellants, for reasons of economy, joined in a single set of assignments of error, the assignments are voluminous and detailed, and to some extent, repetitious. Many of the matters formally assigned as error are not involved in the appeal of the cargo interests.

It is hardly necessary to state that the theory upon which the cargo interests seek to recover from the Wilmington Transportation Company their damages and general average contributions is that upon which similar interests were successful in the *Toluma-Sucarseco* case (294 U. S. 394, 55 S. Ct. 467). The libel of the cargo interests sounds in tort and is against the operator of the non-carrying vessel,—the tug and flotilla of scows. It has long been established, and was confirmed by the Supreme Court in the case above cited, that where the non-carrying vessel was in fault for the collision, in whole or in part, the entirely innocent cargo owners are entitled to recover from the non-carrying vessel or its operators

their full damages, which include any general average contributions which they have been obliged to pay as a result of the collision. It is elementary, of course, that the existence of contributing fault on the part of the carrying vessel has no bearing upon the primary liability of the non-carrying vessel for 100% of the loss suffered by innocent cargo, if the fault of the non-carrying vessel contributed to the collision to any extent. We understand it to be conceded by the appellee that if the tug and scows be held wholly or partially in fault for the collision, these cargo appellants are entitled to recover their full damages from the Wilmington Transportation Company.

From the standpoint of the cargo interests, the essential question in the case was, and on this appeal is: Was there any fault on the part of the "David P. Fleming" or its tows which contributed to the collision? If so, the cargo interests should have a decree for their full damages, regardless of whether or not there was contributing fault on the part of the "Koyei Maru". The cargo interests, therefore, are not directly concerned with the findings of the trial court imposing fault upon the "Koyei Maru", and it would be an impertinence on their part directly to attack or defend such findings. The cargo interests *are* seriously concerned and aggrieved with the findings of the trial court exonerating the tug and flotilla, and it is at those findings and the decree based thereon that our attack is directed. An adequate presentation renders inevitable some comment upon the movements and

conduct of the "Koyei Maru", and possibly some criticism of the findings of fault which have been made against her, but it will be understood that the cargo interests are essentially concerned with a review of the conduct of the "David P. Fleming" and her tows.

In exonerating entirely the tug and tows from fault contributing to this collision, it seems to us that the trial judge fell into three basic errors:

1. He completely missed the significance of the "David P. Fleming's" improper and misleading lights and the message which they conveyed to the "Koyei Maru" at 2:06 a. m. There we have a factor which directly and immediately accounts for the collision, and it is obvious from his remarks at the conclusion of the case that the trial judge did not "get it at all".

2. He failed to give due weight to the great preponderance of evidence showing that the green side light on the first scow was not displayed so as to be visible to the "Koyei Maru", and that on none of the scows were the green side lights of sufficient brilliance to be visible in their true color.

3. He was fully appreciative of the great danger in blocking the mouth of the busy harbor with a clumsy tow half a mile in length, but deemed himself powerless to do anything about it in the absence of a specific statute prohibiting tows of that character. He failed to give effect to the rule that one who imposes upon his fellow navigators the extraordinary hazards incident to the naviga-

tion of such a flotilla, is held to the exercise of the very highest degree of care, and he failed to realize that the "David P. Fleming" did not meet that duty in several obvious respects.

Our argument will be made under the following specific heads:

1. The "David P. Fleming" was in fault in that her range light was not located and screened in accordance with Article 2-e of the International Rules, and the appellee failed to sustain the burden of showing that such violation of the rule could not have been a contributing cause to the collision.

2. By preponderance of the evidence, the "David P. Fleming" was in fault for failing to carry on each of the scows, green sidelights of sufficient brilliance to be visible at a distance of at least two miles.

3. The collision was caused or contributed to by the failure of the "David P. Fleming" to exercise the degree of care required of her under the circumstances.

A. The "David P. Fleming" was negligent in taking her tow across the main channel to the entrance of Los Angeles Harbor without necessity therefor.

B. The "David P. Fleming" was negligent in failing to maintain attendants on each of the scows.

C. The "David P. Fleming" was negligent in failing to warn the "Koyei Maru" of the presence of the three scows in tow by earlier use of her searchlight.

4. The extent of the presumption in favor of the trial court's findings.

SPECIFICATION OF ERRORS.

The clerk has suggested that the matter on pages 15 and 16 of the brief on behalf of the cargo interests is insufficient, as a specification of errors relied upon, to comply with Rule 24, Subd. 2b. We therefore submit the following, and pray that it be inserted in the brief on behalf of the cargo interests heretofore filed.

The cargo interests will place principal reliance upon the following specific errors:

1. The trial court erred in finding and holding that the undisputed fault of the "David P. Fleming" in displaying an unscreened range light, visible all around the horizon, did not contribute and could not have contributed to the collision. (Assignments XXIII, XXIV, XXV, XXXV, A. 610-2, 614.)

2. The trial court erred in finding and holding that the scows were properly and sufficiently lighted, and in failing to find and hold that the green running light on each of the three scows, and particularly the green running light, if any, on the first scow, was insufficient and not of the required brilliance. (Assignments IV, VI, XII, XIV, XXXI, XXXII, XXXV, A. 606, 608, 613-14.)

3. The trial court erred in failing to find and hold that the "David P. Fleming" violated the duty of extreme care

imposed upon her under the existing circumstances, particularly in the following respects:

a. In taking her long tow across the entrance to Los Angeles Harbor without necessity therefor.

b. In failing to maintain a lookout on each of the scows.

c. In failing to give timely warning of the presence of her tows by use of her searchlight. (Assignments XI, XXVII, XXIX, XXXIII, XXXV, A. 607, 612-14.)

ARGUMENT.

I.

The "David P. Fleming" Was in Fault in That Her Range Light Was Not Located and Screened in Accordance With Article 2-E of the International Rules, and the Appellee Failed to Sustain the Burden of Showing That Such Violation of the Rule Could Not Have Been a Contributing Cause to the Collision.

It is hornbook law that when a vessel is guilty of a flat violation of a statutory rule designed to prevent collisions, the presumption is that the violation of law was a contributing cause, if not the sole cause, of collision, and the burden rests upon the guilty ship of showing not only that her fault might not have been one of the causes, or that it probably was not, but that it *could not have been* one of the causes.

The above rule, last announced by the Supreme Court of the United States in the Selja-Beaver case (*Lie v. San Francisco & Portland S. S. Co.*, 243 U. S. 291, 37 S. Ct. 270-72), rests upon a long line of autohrity which is unquestioned. It has been specifically applied by this court to a vessel which failed to carry a stern light in accordance with law, in *Puget Sound Nav. Co. v. Nelson,* 41 Fed. (2d) 356. It is inconceivable that the rule and its application to the case at bar will be seriously disputed by the appellee.

The "David P. Fleming" was guilty of specific violations of the International Rules dealing with navigation lights in three respects:

1. The range light on the after mast of the tug was unscreened and visible all around the horizon. (Art. 2-e.)

2. The tug's range light was not fifteen feet or more higher than the masthead or upper towing light, but was only two or three feet higher. (Art. 2-e.)

3. The three towing lights, or, put it another way, the masthead and two towing lights, all in a vertical line, were not spaced at least six feet apart, but were only three feet apart. (Art. 3.)

There is no dispute whatsoever about the existence of these conditions. They were unqualifiedly admitted by the appellee's witnesses, including the appellee's marine superintendent. The appellee, therefore, has the heavy burden of establishing by affirmative proof that none of these defects *could have* contributed to the collision.

An analysis of the evidence shows that the appellee failed to sustain the burden, and that undisputed evidence establishes that the unscreened and improperly placed range light was the most significant factor in the chain of events which brought the Japanese ship and the "Pioneer No. 11" in collision.

Let us leave out of consideration the actual spacing of the towing lights. There is no evidence that anyone on the Japanese vessel ever saw the real towing lights or was in any way influenced thereby. It is an almost necessary inference that at all times the bearing of the "Koyei Maru" was at least two points abaft the tug's beam, and undoubtedly the real towing lights were at all times obscured by the screens, as they should have been. We shall therefore make no point of the inadequate spacing of the towing lights. It was the position and the un-

screened condition of the range light which really brought about the collision, and that light became a factor in the situation at the very rise of the curtain, when the "Koyei Maru" came around the breakwater at 2:04 a. m. and for the first time had a view of the open sea.

At that time the positions of the vessels were such that the tug presented her starboard quarter to the starboard bow of the "Koyei Maru", and the only lights which could have come within the range of vision were the range light and the stern light on the after end of the tug's house. At 2:04 a. m. these appeared to the "Koyei Maru's" master and officers as a "blur of light which appeared white".

Let us pause here and consider what should have been visible to the "Koyei Maru" at 2:04 a. m., assuming all the lights of the "David P. Fleming's" flotilla to have been in accordance with law, properly placed and of the required brilliance. No light should have been visible from the tug except the white stern light. The towing lights, side light and *the range light* should have been blanked out by their screens. The tug should have presented to the view of those on the "Koyei Maru's" bridge a single sharp white light and no other. Each of the scows, assuming them to have been properly lighted, should have shown a clear green light and no other. Obviously, every unit in the flotilla was always less than a mile away from the "Koyei Maru", so every one of the above lights should have appeared sharp and in its true color. If, at 2:04 a. m., the "Koyei Maru" had seen a clear white light on her starboard bow and three green lights stringing in a line across her course, there would not have been any doubt in the minds of her navigators

that a tug with a long three unit tow headed approximately *south* was crossing ahead of her.

What the flotilla did display to the "Koyei Maru" were two dim lights to her port, which later turned out to be the side lights on the last two scows, and which were so dim that they appeared colorless, and *two* dim white lights on the stern of the tug, which were so close together that they were indistinguishable as separate lights and produced a single "blur".

The lack of strong green lights on each of the three scows and the absence of any light at all on the starboard side of the first scow were, of course, strong factors in the situation as it appeared to the "Koyei Maru" at 2:04 a. m., but as we can only consider one matter at a time, we must postpone discussion of the lights on the scows to the third subdivision hereof, and confine the present presentation to the lights on the tug.

A "blur of light" is hardly informative as an aid to navigation, and it is not surprising that the master of the "Koyei Maru" found himself in doubt as to what was ahead on the starboard bow. It might be any sort of small craft on any conceivable course. The "blur of light" might be cabin lights of a yacht, a vessel at anchor, a small tug or a fishing boat. All that was indicated to the "Koyei Maru" by the blur of light was that some sort of a vessel was there. The master of the "Koyei Maru" slowed his engines, altered his course slightly to starboard and blew a single blast of the whistle in the avowed hope of evoking some response from the vessel to starboard and gaining some idea of the character and course thereof. Whether heard or not, his whistle was not answered by the vessel to starboard, and as the blur of light was ob-

served to be broadening on the starboard bow, thus apparently passing to the right of the "Koyei Maru's" original course, the master brought his vessel back on that course.

We see, therefore, that even at this early moment the unscreened range light was productive of confusion in the minds of the "Koyei Maru's" navigators. That light should not have been visible at all and there should have been no "blur". The image of a single stern light would at least have suggested a vessel quartering away from the "Koyei Maru's" course, and, taken in relation with lights on the scows, might have warned the "Koyei Maru" that a tow was crossing her course.

It is obvious that a "blur of light" would suggest the possibility of two lights close together and therefore the possibility of a tug with tow. It did suggest that possibility to the "Koyei Maru's" master, and at 2:04 a. m. he discussed it with his officers. [Ap. 561.] Viewed as towing lights, the blur was positively misleading, for if a tug to starboard showed her towing lights it could not present an overtaking situation.

Furthermore, if the blur at 2:04 a. m. represented towing lights, it completely eliminated the possibility of any relationship between it and two lights to port, for obviously the tug towing the vessels to port would not be showing towing lights.

So, at 2:04 a. m., the "David P. Fleming's" lights wrought confusion if not actual deception, and that this confusion contributed to the collision is fully apparent. If the "David P. Fleming's" lights had indicated the real situation, the "Koyei Maru's" master would have been aware of or at least he might have suspected the passing

of a tow ahead of him. He would have reversed his engines and possibly would have dropped anchor. Then there would have been five minutes of time and half a mile of sea for the "Koyei Maru" to avoid fouling the tow, instead of one minute and a ship's length as was the case at 2:08 a. m.

Let us now project the story to 2:06 a. m. At this time the "David P. Fleming's" range light ceased to be merely confusing and became directly misleading. At that moment the blur to starboard resolved into two vertical white lights and there was a momentary flash of green. That meant definitely a tug with tow, but it meant a tow of an entirely different character than the one the "David P. Fleming" was actually handling and upon quite a different course. It meant *one* vessel in tow (or a tow less than 600 feet long). Almost simultaneously the "Koyei Maru's" master saw the "dark object" ahead, and *there* was the single tow which the lights indicated! At the same moment the searchlight flashed from the tug and played upon the dark object. Upon the evidence of the two lights and the flash of green to starboard, the dark object almost dead ahead and the searchlight beam playing from the vessel carrying the two lights upon the dark object, the master of the "Koyei Maru" did exactly what any sensible navigator would do when confronted with a like situation. He reversed his engines and set his helm hard left to go astern of the dark object. The dark object was twice 600 feet from the tug's lights, so *two* lights on the tug absolutely precluded the idea of there being any more vessels astern of the dark object. If navigation lights mean anything, the "Koyei Maru's" master must have believed at all times between 2:06 and 2:08 a. m. that he had only to pass behind the dark object

and he would go clear. It cannot be disputed that if the tow had actually been what the two lights and the searchlight indicated there would have been no collision, for it is clear that the "Koyei Maru" passed well astern of the first scow. At 2:08 a. m., when the two lights to port showed green instead of white, the "Koyei Maru's" master realized that the tug's lights were false guides and that there were two more vessels in tow astern of the dark object. He promptly executed the last maneuver open to him to avoid crossing the line of tow. He dropped his anchor.

The engines had been going astern for two minutes and the added drag of the anchor and chain brought the ship almost to a stop by the time it reached the line of tow. The relatively slight damage to the two vessels shows that the motorship had very little headway when the impact occurred. There was undoubtedly much greater momentum on the scow than on the "Koyei Maru" when they came together. As the "Koyei Maru's" master, by dropping his anchor at 2:08, was so nearly able to bring his vessel to a stop short of the line of tow, it would seem uncontradictable that no collision would have taken place if the anchor had been dropped at 2:06.

Between 2:04 and 2:06 a. m. the Japanese master was in doubt as to the vessels to his port and starboard. At 2:06 his doubts were removed, as from the tug's lights and the appearance of the dark object he had every reason to believe that there was no possiblility of collision if he passed astern of the dark object, and there was no necessity for him to stop short. He therefore didn't drop his anchor at 2:06 and apparently did not need to. At 2:08 a. m., when the actual situation burst upon him,

he had just sixty seconds within which to meet the emergency and stop his vessel short of the line of tow. From 2:06 to 2:08 a. m. he was misled by the unscreened range light on the tug.

> "Q. By Mr. Black: At the time you first rang up 'full astern' and changed your course to port, how many vessels did you then believe were being towed?
>
> A. I figured there was one thing in tow because I saw two lights and a flicker of green." [Ap. 355.]

If at 2:06 a. m. the "Koyei Maru's" master had not been so misled;—if at that moment the tug's lights ad the appearance of the dark object had not swept all doubt from his mind;—if at that time there had remained any doubt as to what was ahead of him, or he had had any inkling of the true situation, we must assume that the "Koyei Maru's" anchor would have been dropped at 2:06 a. m. and there would have been no collision.

Under the rule stated at the beginning of this subdivision, the presumption is that the "David P. Fleming's" unscreened range light contributed to the collision. Our examination of the evidence demonstrates that at 2:06 a. m. the unscreened range light and the white stern light below it conveyed a false message and continued to convey it until 2:08. The message was "Go astern of the dark object; there is safety". The truth was "Go astern of the dark object and there is disaster." The evidence further establishes that if the master had not relied upon

the false message from 2:06 to 2:08 a. m. he could have dropped the anchor two minutes earlier than he did and entirely avoided crossing the line of tow. Who can say he would not have done so if he had not been misled?

The trial court held that the unscreened range light could not have contributed to the collision, and counsel for the appellee included in their draft of the findings the astonishing statement that the improper light was of benefit to the "Koyei Maru". [Ap. 111.] Let us pass without comment this preposterous concept of counsel and see what the court actually did think of the matter as disclosed by the oral opinion. The court said:

> "Assuming that the lights were misleading to some extent, I think the fault was on the steamer (*sic*) in not recognizing the lights of the scows, and particularly the lights of the scow with which it collided. . . . Seeing the lights of the tug as they must have been and assuming that they indicated one tow, still I do not see that that would relieve the vessel from fault in colliding with the portion of the vessel it did collide with." [Ap. 597-8.]

After the rendition of the oral opinion, the following colloquy took place between counsel for the "Koyei Maru" and the court.

> "Mr. Black: Does Your Honor find expressly that the defective range light on the 'Fleming' could not by any peradventure have contributed to the collision?
>
> The Court: It seems to me that I would have to find that way, Mr. Black. The 'Fleming' itself is

> practically out of consideration. That is the way it impresses me, that it was out of the range. While it was the motive power in a legal sense the entire tow was the whole vessel. I don't see any other conclusion that could be reached. If the 'Fleming' were coming the other way it would have to have a red light, I presume, or a green light visible. I think that light is removed from consideration because it could not have misled the overtaking vessel as to its direction." [Ap. 599.]

From the remarks above quoted it is unmistakable that the judge was in decided confusion of mind as to the purpose and significance of navigation lights. He seemed to be of the belief that the lights of each vessel in the tow should have been sufficient of themselves to warn the "Koyei Maru" as to the whole situation, and that as each vessel passed beyond the "Koyei Maru's" course its lights ceased to have any significance. He apparently had the idea that the "David P. Fleming's" lights indicated nothing but direction, and gave the "Koyei Maru" no information other than that the "Koyei Maru" was in an overtaking situation. He failed utterly to grasp the idea that *two lights* indicated, not an overtaking situation but a crossing situation, and further indicated, when taken in connection with the dark object visible at 2:06 a. m., that there was absolutely no connection between the dark object and any of the lights visible to port.

Once the "David P. Fleming" had passed to starboard of the course of the "Koyei Maru", the court apparently believed that its lights no longer had any significance.

As he put it, "The 'Fleming' itself is practically out of consideration. That is the way it impresses me, that it was out of the range." He failed entirely to appreciate that towing lights are designed to say to the observer, "I have such and such behind me"; that two lights say "I have one tow behind me" or "My tow is less than 600 feet long"; and that three towing lights say "I have more than one tow behind me and the tow is more than 600 feet long."

The court was particularly impressed with the thought that even assuming the "Koyei Maru" to have been misled by the tug's lights, the motorship was in fault for not recognizing the lights of the two aftermost scows, and particularly the lights of the second scow with which it collided. Here again the court failed to appreciate that the two lights showing from the tug, and the sight of the dark object, meant there was no connection between any of the lights to port and the tug and tow, and gave to the vessels carrying the lights to port the definite character of independent vessels. If independent vessels, they were not a factor in the situation presented to the "Koyei Maru", for under the rules they could not cross her bow. She was the privileged vessel as to any crossing vessel from her port hand. "Green to port keeps clear of you" is seamen's primer.

The trial court has in substance and effect held the "Koyei Maru" at fault for running into a green light coming from its port hand.

The only theory of navigation upon which the green light on the "Pioneer No. 11" had the right of way over the "Koyei Maru" was that the vessel carrying that green light was in tow of the tug to starboard. The tug's lights displayed to the "Koyei Maru" said that was not the case.

It cannot be questioned that a navigator is entitled to rely and must rely upon the lights which other vessels display to him, and if he does rely upon misleading lights and comes into difficulties thereby, he has complete justification.

In *The Scotia,* 14 Wall. 170, 20 L. Ed. 822, a steamer was exonerated for running down a sailing vessel which displayed a white light and no side lights. The court said:

> "But we think the Scotia had a right to conclude that the Berkshire was a steamer rather than a sailing vessel, and that, when first seen, she was at the distance of four or five miles, instead of being near at hand. Such was the information given her by the ship's white light, fastened as it was to the anchor stock on deck, and no watchfulness could have enabled her to detect the misrepresentation until it was too late. . . . By exhibiting a white light, she, therefore, held herself forth as a steamer, and by exhibiting it from her deck, instead of from her masthead, she misrepresented her distance from approaching vessels." (20 L. Ed. 824.)

We submit the undisputed evidence shows that the "David P. Fleming's" unscreened range light not only could but did bring about the collision, and the trial court's holding that it could not by any peradventure have so contributed is without basis in law or in fact.

II.

By Preponderance of the Evidence, the "David P. Fleming" Was in Fault for Failing to Carry on Each of the Scows, Green Side Lights of Sufficient Brilliance to Be Visible at a Distance of at Least Two Miles.

The evidence as to the condition of the lights on each of the scows is in decided conflict.

Nixon, the tug's deckhand, testified that prior to leaving the terminal to pick up the scows, he washed and dried the scows' side lights and stern lights, filled them with kerosene, trimmed the wicks and lit them; that on the way out to pick up the scows he watched the lights and observed that they were burning properly and none of them was smoking; that when the tug reached the scows he went on board each of them and fitted the lights and screens in place. He observed that they were burning when he left the scows, and thereafter, from his position at the wheel of the tug, he frequently looked astern and saw that the two side lights of the first and the other scows were burning. The captain of the tug and the engineer were also diligent in looking astern. They also could see the side lights on all of the scows and testified they were burning. After the collision, each of the tug's three witnesses had occasion to observe all the lights on all the scows at one time or another, and testified they were still burning.

On the other hand, none of the "Koyei Maru's" witnesses ever saw any light whatsoever on the first scow. The master, second officer and third officer on the bridge, and the first officer on the forecastle head, were fully

on the alert and were constantly engaged in peering ahead, some of them with high-powered glasses, to see what was ahead of them and to interpret the lights which they did see to port and to starboard. This vigilant scrutiny was continued from 2:04 a. m. until the very moment of the collision. Neither then nor afterward was any light seen on the first scow.

They did see, at 2:04 a. m. and at all times thereafter, the starboard lights of the second and third scows, and at 2:04 a. m. both of those lights were further away from them than any light which may have been on the first scow. True, they did not see the lights on the second and third scows as green lights. Until 2:08 a. m. they saw them only as white lights. The only explanation is that the lights on the second and third scows were so dim that at a distance of more than 200 or 300 yards they appeared colorless. Nevertheless, they were seen from the very first, and the alleged light on the first scow was not seen.

The detailed testimony of Nixon as to the manner in which he prepared, lighted and placed the lights on the scows, and the testimony of all three of the tug's witnesses as to their constant observation of the burning lights as the tow proceeded, was a little too glib and positive to be absolutely convincing. If that testimony and all its implications was absolutely true, we are at a utter loss to understand why all three of the green lights were not at all times perfectly sharp and clear. Certainly all of them should have been visible at all points within the range of their screens for twice or four times the distance between them and the "Koyei Maru" when she rounded the breakwater.

Let us take the testimony of the tug's witnesses at its face value. We may assume that the lights were lit and remained burning in some fashion until the time of the collision. We may further assume that when they were put aboard the scows, the glasses were clean and the lamps were not smoking. Finally, we may assume that at least from the standpoint of the three men on the tug, who knew exactly where the lights were and what to look for, they were visible at the respective distances by which the three scows were separated from the tug by the length of the tow lines.

Beyond that there is no evidence. *We are left wholly uninformed as to the extent of their brilliance.*

Articles 2 and 5 of the International Rules, dealing with side lights, are positive in the requirement that the colored lights shall be of sufficient brillance to be visible for two miles. There is absolutely no evidence that the oil lights on any of the scows complied with this requirement. Indeed, the only evidence is directly to the contrary, for to the officers of the "Koyei Maru", who were always considerably less than a mile away from the furtherest light, the lights on the second and third scows appeared white and dim until the "Koyei Maru" came within a few hundred feet of them.

It is a well known fact that the brilliance of oil lamps is regulated entirely by the height of the wick exposed to flame. Thus, the brilliance of the light on any particular occasion depends entirely upon how high the lamp lighter turned the wick. It is equally well known that if the flame is turned too high the lamp will smoke.

We think the failure of the "Koyei Maru's" officers to see the lights of the second and third scows as green

lights until 2:08 a. m. was due to the fact that the wicks were set too low to give the lights anything like the required brilliance. It is well known that if side lights are not burning brightly, they will not always show their true colors and will appear to other vessels as dim, colorless lights.

There was obviously some condition affecting the starboard light on the first scow that did not affect the lights on the other two. If the wicks had been trimmed in the same manner, the officers on the "Koyei Maru" would have seen three dim colorless lights instead of two, and one of them almost dead ahead. They certainly were not lacking in vigilance, so there must be some reason to account for their entire failure to see the light on the first scow.

A number of explanations suggest themselves: The screen may have been carelessly placed by Nixon so that it obscured the light for two or three points on the angle from which the "Koyei Maru" was approaching; some obstruction may have gotten in the way of the light; the flame may have been turned too high and smoked the glass from the point at which the light would be visible to the "Koyei Maru"; or the light may have been turned so low that it was not visible except at a very short distance. None of these suggestions is precluded by the testimony of the tug's witnesses, and we submit something of the sort is the only thing which will account for the failure of the Japanese ship's officers to see that light.

The only evidence in the case as to what lights were visible from the starboard side of the scows, after the flotilla had gotten under way, comes from the "Koyei Maru". None of the tug's witnesses had the same viewpoint once the flotilla had left the anchoring grounds. At no time could anyone on the tug see the starboard lights of the scows from any point, except dead ahead. They probably had a side view of the port lights as the tug made the turn to the southward, after clearing the Long Beach breakwater, but in the very nature of things they could never have had a side view of the starboard lights.

For the purposes of this appeal let us accept the testimony of the tug's witnesses that, at least for the distance of 1200 feet which separated the tug from the first scow, the green light on the first scow was visible dead ahead. It may be true that from that distance they always saw a green light on the first scow, for it is not at all difficult for a person to see a light and know its color, if he knows exactly where and what the light should be. Be that as it may, the fact remains that the only witnesses who had any opportunity of seeing how the first scow's starboard light showed on the starboard beam, could see absolutely nothing.

When the conflicting evidence is weighed pertaining to the lights on the scows, and particularly the absence of a light visible to starboard on the first scow, it seems to us that such evidence plainly preponderates in favor of the "Koyei Maru". Courts have sometimes said that positive evidence to the effect that lights were lit and burning

brightly and that whistles were blown and sounded clearly, will override pure negative evidence to the effect that such lights were not seen or such whistles heard by those on another vessel in a position to see or hear them. If such a rule is sound, it can certainly have no application where, as in this case, the affirmative proof is entirely lacking as to the brilliance of the light or as to the distance which it could be seen at the time by a person in possession of normal faculties. We submit, the "David P. Fleming's" witnesses are entitled to no presumption over the "Koyei Maru's" witnesses on the bare showing that the lights of the scows were burning. Under the circumstances of this collision it is well established by authority that the presumption arising from the conflicting evidence is the other way. The lights on the scows were designed to be seen by any vessel approaching from the angle of the "Koyei Maru" within a range of two miles. If they were not seen from that angle and within that distance, two possibilities immediately suggest themselves: (1) Either the light was not burning with sufficient brilliance to be seen, or was extinguished or obscured, or (2) the observers were not vigilant or were deficient in eyesight.

We have from the "Koyei Maru" the testimony of the master and his three officers. Three of them had a viewpoint from the height of the bridge, one from the forecastle head. All of them were looking intently ahead, their faculties sharpened by the presence of lights to port and starboard. They were looking for lights or any

other evidences of obstructions in their course. There is no suggestion that any of them was deficient in eyesight. Three of them were actually using power glasses of various sorts, and all of them saw lights which were actually farther away from them than the light which should have been on the first scow dead ahead. Notwithstanding this undisputed vigilance on the part of four competent navigators, not one of them saw the alleged starboard light on the first scow.

Opposed to this impressive testimony is testimony from the tug's witnesses that a light had been cleaned, lit and placed something over an hour before, and that at about the time of the collision it was visible from 1200 feet ahead. This testimony, as we have seen, was given by witnesses who, for nearly an hour, had not been in a position to see how that light appeared from the scow's beam.

In giving due weight to all such evidence, we submit the only reasonable conclusion which can be reached is that there was something wrong with the light. The authorities so hold.

In *The Pierre Corneille,* 133 Fed. 604, Judge De Haven of the Northern District of California held the ship "Larnaca" in fault for failure to maintain proper lights under the following circumstances: A collision occurred just outside the entrance of San Francisco Bay. The "Larnaca" was outward bound and close hauled. The "Pierre Corneille" was coming in, sailing free. The lookout, master and pilot of the "Pierre Corneille" saw the "Larnaca"

as a dark object about half a mile distant, examined her through a glass and could see no side lights. They therefore presumed that the ship was bound inward and changed the course of their vessel to starboard, bringing her directly across the course of the "Larnaca". The master of the "Larnaca", her lookout, second mate and several seamen testified with great positiveness that her lights were set and burning clear and bright. The court stated that the burden of proving the absence of lights on the "Larnaca" was upon the "Pierre Corneille", and that she had sustained the burden. He held:

> "In view of the sharp conflict in the evidence, it is difficult to reach any certain conclusion as to the actual fact in relation to the lights upon the Larnaca, whether they were exhibited or not; but after careful consideration it seems to me the finding should be in favor of the Pierre Corneille. She was coming into the harbor, and was under the command of an experienced pilot, and it is not at all probable that she would have been navigated in the way she was if the starboard light of the Larnaca had been seen, for with that light in view the master and pilot of the Pierre Corneille would have known that porting her wheel, as they did, and changing her course to starboard, would make a collision inevitable. But they did not see this light, and the most reasonable conclusion is that, if set at all, it was not supplied with sufficient oil, or for some other reason had become so dim that it was not visible for any distance. The language of Brown, J., in the case of The Amboy (D. C.) 22 Fed. 555, is particularly applicable to the question now under discussion, and may well be quoted in concluding this opinion:

'The purpose of lights is to be seen. If they do not fulfill that office to ordinary observation, the vessel must be held in fault; and when several witnesses concur in testifying that the lights could not be seen in a situation where they ought to have been seen, and, more especially, where it appears that the persons in charge of another vessel maneuvered their own vessel in reference to the other, and that, upon looking specially for colored lights, they could not see any, and actually navigated their own vessel in a way that would have been highly improbable had the colored lights been visible, the inference seems irresistible, and this court has often held, that there must have been some defect in the lights that ought to have been seen, but was not seen.' (Citing cases)."

In *The Virginian,* 235 Fed. 98, this court affirmed a judgment of the District Court (217 Fed. 604), whereby a steamer using oil lights was held in fault because her lights were not visible to the other vessel. There, as here, the testimony was in sharp conflict. There was much testimony from her officers and crew to the effect that her lights were burning brightly and properly placed, yet there was testimony from the approaching vessel that her side lights could not be seen, although her sound signals were heard. This court said:

"The one strong, salient fact which in this conflict of evidence we think is controlling, is that the officers on board the Virginian who were responsible for her safety and whose duty it was to navigate her and to respond to the signals of passing vessels, distinctly heard the Strathalbyn's signals, but were unable to discover her lights on a night which was dark and

clear and free from fog. We think that the lights of the Strathalbyn must have been at that time either so dim as to be visible but a short distance, or placed in a position where their rays were obstructed or obscured by the cargo of lumber which was carried on deck or by the stanchions which held the cargo in place."

The same considerations have been held controlling in many other cases.

The Martha E. Wallace, 148 Fed. 94;

The Lansdowne, 105 Fed. 436;

Ross v. Merchants & Miners Transp. Co., 99 Fed. 793;

The Livingstone, 87 Fed. 769;

The General, 82 Fed. 830;

The Daylight, 73 Fed. 878;

The Circassia, 55 Fed. 113;

The Monmouthshire, 44 Fed. 697;

The Westfield, 38 Fed. 366;

The Narragansett, 11 Fed. 918.

In *The Westfield, supra,* the eminent admiralty student, Judge Addison Brown, stated the principle succinctly as follows:

"Where competent officers are in their places, attentive to their duties, and navigating their vessel according to what can be seen, their testimony that no light was seen, which ought to have been seen and must have been seen if properly burning, is entitled to superior credit, if their evidence is not outweighed by other circumstances."

In *The Narragansett, supra,* the principle was applied, not only to inability to see another vessel's light which ought to be seen, but to inability to see it in its proper color. There was evidence that a schooner's running lights were properly set and screened, and that they were burning. An approaching steamer, with its master vigilantly alert, and using a glass in search for lights, was unable to see the schooner's green light until he came close to it and then saw it as a dim white light. There was evidence from the crew of the schooner that the light was burning, and that it showed green in color. The district and circuit judges concurred in holding that the evidence of the steamer's master was entitled to greater weight, and the schooner was held solely in fault.

It seems to us that the application of these principles in the case at bar is required by the logic of the situation. The "Koyei Maru's" witnesses were in a position to see how or whether or not the lights of the scows appeared from the starboard side. The witnesses on the tug were not. The direct evidence from the officers of the "Koyei Maru" is unimpeached, and is not affected or otherwise challenged by any circumstance in the case. In the language of Judge Brown (*supra*), such evidence is entitled to "superior credit".

We therefore submit, the trial court was in error in finding that the three scows in tow of the "David P. Fleming" carried the side lights required by law, and particularly in finding that the first scow carried a proper side light.

III.

The Collision Was Caused or Contributed to by the Failure of the "David P. Fleming" to Exercise the Degree of Care Required of Her Under the Circumstances.

It is clear from the oral opinion that the trial judge sensed fault and culpability on the part of the "David P. Fleming" in her operation of this half mile tow in the very harbor mouth, for again and again he spoke of the dangers inherent in such a situation, and stated that there was great need for statutory regulation of such tows. It was his apparent view, however, that unless such tows were expressly made unlawful, there was nothing the court could do toward regulating them. Commenting upon his order for a decree in favor of the appellee, he said:

> "Yes, I am assuming that follows necessarily. I might add that unless there is something in the law that makes this tow in itself something unlawful, I don't feel I could do anything else. If there were no such regulation, I would, without any hesitancy whatever, hold that a tow of that length is, in and of itself, a dangerous proposition." [Ap. 599.]

We are sure the trial judge overlooked the point that a ship may be guilty of fault by failure to take extraordinary prudential measures made necessary by her own peculiar condition, even though no positive requirement or prohibition may be violated.

We grant that extraordinarily long tows are not unlawful *per se*. They are *highly dangerous per se,* and the courts have held that they can only be tolerated if they

exercise every reasonable precaution to avoid injury to others because of their length, limitations as to ability of maneuvering, and the great amount of sea space they usurp.

The Howard, 253 Fed. 599, affd. 256 Fed. 987;
The Helen, 204 Fed. 653;
The Plymouth, 186 Fed. 105;
The Bee, 138 Fed. 303;
The Admiral Schley, 131 Fed. 433, affd. 142 Fed. 64;
The Gladiator, 79 Fed. 445;
The H. M. Whitney, 77 Fed. 1001, affd. 86 Fed. 697.

In *The Howard, supra,* speaking of a tow half a mile long, the District Court said:

> "Tows of such length are doubly dangerous. They close for the time being a great stretch of water to other vessels, and it is exceedingly difficult for a tug with such a tow to so maneuver as to do its part in escaping from dangerous situations, or from situations which may easily become dangerous. The exercise of extreme care is, under such circumstances, incumbent upon it." (p. 602.)

In *The Gladiator, supra,* the court said of a tow approximately 2500 feet long:

> "While, as said in the Berkshire, we cannot condemn a tow of the character of that in this case as absolutely unlawful, yet we must hold tugs which navigate this coast with such long and essentially hazardous fleets to the use of the extremest care in the interests of common safety."

If a half mile tow is essentially hazardous and dangerous in the open sea, it is doubly so when it undertakes to navigate in the vicinity of harbors, entrances or crowded waters. Thus, in *The H. M. Whitney,* 86 Fed. 697-701, the court said:

> "To handle these long tows in that manner, hauling them through narrow and tortuous channels in such a fog as this, is a serious menace to the safety of navigation. Whether the navigators who undertake such experiment do or do not violate some particular provision of the sailing regulations, they certainly expose their fellow navigators to a greatly increased risk, unnecessarily; and for a collision resulting from such action they should be made to respond. Navigating in crowded waters, with essentially hazardous fleets, they should, in the language of the court of appeals in the First Circuit, *'be held to the extremest care'.*"

A.

THE "DAVID P. FLEMING" WAS NEGLIGENT IN TAKING HER TOW ACROSS THE MAIN CHANNEL TO THE ENTRANCE OF LOS ANGELES HARBOR WITHOUT NECESSITY THEREFOR.

From some undefined point west of the Long Beach breakwater, the navigator of the "David P. Fleming" set his course for Catalina south by the tug's compass. He did not know his compass deviation, and subsequent events proved that the true course was substantially west of due south. In any event, it was reasonably established by the evidence that the course carried him approximately half a mile from the lighthouse at the end of the San Pedro breakwater. The following of this course, with

this half mile tow, resulted in effectually "corking" the entrance to Los Angeles Harbor for ten or fifteen minutes. In the absence of any necessity therefor, we submit the taking of such a tow across the mouth of the harbor at night is *of itself* a failure to use the "extremest care" which the circumstances require.

The record will be searched in vain for any evidence of necessity for the making of this tow at night. Presumably it was so made for reasons of convenience or economy to the operator. No reason is shown why the arrivals and departures of the rock tows could not have been timed so that they reached the vicinity of the harbor entrance in daylight hours, when their nature would be readily discernible by all navigators, and the hazards of collision would be minimized.

Secondly, there was no conceivable necessity for the rock tows to close the mouth of the harbor at all. They had the entire channel to the east of the harbor entrance on which to make the passage to Catalina, and again no reason is shown why the "David P. Fleming" should have directed her course at night across the mouth of the entrance. It might have taken a little longer to have made the crossing a mile or so to the eastward, but certainly that is no excuse for imperiling the shipping which is constantly passing in and out of the harbor.

Thirdly, there was no reasonable excuse for the excessively long tow;—certainly there was none for stretching it out to nearly 3000 feet while crossing the harbor mouth. The tug's master and other of her witnesses testified that hawsers of the length used were necessary to prevent breaking of the lines in rough seas and when the scows were loaded. The complete answer to this is that the

scows were unladen at the time of the collision and there was no rough weather. It would have been an easy matter and, we submit, it was the bounden duty of the "David P. Fleming" to have shortened her lines and made a compact, easily managed and easily identified flotilla, at least for so long as it was in close proximity to the harbor entrance.

Upon these aspects of the case there is strong authority indicating that the "David P. Fleming" was deficient in her obligations to fellow navigators in all of the above respects.

In *The Umbria,* 153 Fed. 851, a tug with tow undertook to cross the fairway in a channel in New York harbor. She stopped in the middle of the channel to shorten hawsers and was run into by a steamer. Both vessels were held in fault, that of the tug being found in the following language:

> "The Mathews was in fault for executing a maneuver which required so much time and occupied so much space so near the center of the channel, without taking precautions to prevent passing steamers from being misled. *It is not shown that it was necessary for her to occupy the channel at all,* and she certainly could have made the change at the edge of the channel with almost absolute safety. Having chosen the channel itself as the theater of her operations, she should have had a competent lookout constantly on duty and should have been ready at all times to answer and give signals, and to act promptly

in order to prevent disaster to herself, to her scows and to others. With no one awake in the pilot house this was impossible." (p. 854.)

In *The Algeria,* 155 Fed. 902, a tug with a tow 1250 feet long undertook to cross the Delaware River. It was the custom for tugs and tows so doing to stop on the eastern side of the channel and shorten hawsers before beginning the crossing. The tug undertook to cross the channel without shortening hawsers and began the passage. About half way across she stopped and there proceeded to shorten hawsers. While this was going on there was a collision with a steamer. The court found both in fault and said of the tug:

> "The tug should have stopped and shortened her hawsers before attempting to cross, should have signaled her intention before undertaking the passage, and should not have stopped in mid-channel, thus increasing a danger already apparent." (p. 905.)

In *The New York Central No. 22,* 124 Fed. 750; aff'd 135 Fed. 1021, the tug "John Fleming", with three scows in tow, was proceeding in a channel in New York harbor at night. She stopped in the channel to take in hawsers and get the scows alongside in order that she might dock them. During the maneuver the scows drifted across the channel with the flood tide. The tug had proper towing lights, which were seen by the approaching tug "New York Central No. 22", although no lights were seen indicating a tow astern. The towing lights were well on the

starboard of the "No. 22", and she proceeded on her course and passed the tug when a dark object suddenly loomed up on the port bow, which turned out to be a dumping scow in tow of the "John Fleming". The court said:

> "There can be no question that the Fleming was grossly in fault for permitting her barges to drift such a distance away and to block the channel without the lights on them, required by law, to indicate their positions. This method of towing on long hawsers in the crowded waters of New York Bay can only be justified, if at all, by the exercise of the utmost exactness on the part of the tug in performing her duty to keep her boats in line, so that passing vessels can navigate safely with regard to them, and by the exercise of the utmost vigilance to see that the tow's lights are at all times exhibited as the rule requires. No. 24 (the scow in tow) was also in fault for the failure to exhibit lights."

It will be observed that the facts in the above case present quite a similar situation to the case at bar.

B.

THE "DAVID P. FLEMING" WAS NEGLIGENT IN FAILING TO MAINTAIN ATTENDANTS ON EACH OF THE SCOWS.

None of the units of the "David P. Fleming's" half mile tow had any independent means of motion, steering, communication with each other or with the tug, or (except for their lights) means of advising other vessels of their presence and condition. They were "dumb tows" in every

sense of the word. In view of the great limitations of such craft to guard their own safety and that of other vessels, it would seem that the least the appellee could have done would have been to have provided a lookout on each of the scows.

It is too clear for argument that if there had been a lookout on the first or second scow, or both of them, a great deal could have been done by such lookouts to avert collisions with any craft which might approach the tow. Such lookouts could have maintained the lights in proper condition, could have made sound signals, could have ignited flare-ups, or even, in the case of imminent danger, could have cut the tow line. It has been repeatedly held that a proper lookout on a vessel is the first requisite of the General Prudential Rule (Article 29), and that his function is not only to prevent his own vessel from running into others, but to give timely warning so that precautions can be taken to prevent other vessels from running into his.

The "David P. Fleming's" witnesses testified at considerable length in an endeavor to excuse the absence of lookouts on the scows. They insisted there were no accommodations on the scows for an attendant, that there was nothing such an attendant could do as there was no means of communication between the scows or between any of them and the tug, and that if an attendant were placed upon them he was liable to be washed overboard.

A brief survey of the evidence will show that none of these excuses will hold water.

It may be granted that there would be some danger to an attendant on a heavily laden barge or scow, unprovided with shelter and being towed in a rough sea. These scows were not laden at all, and by positive admission of the tug's captain there was nothing on the night in question which would have in any way jeopardized the safety of a lookout on each of the scows. They were large vessels. Two of them were 110 feet long by 40 feet beam, and had a freeboard, when light, of 9 or 10 feet. The third was even larger. Under the weather conditions prevailing on that night they were as safe as ferry boats. True, they had no shelters, but seaworthy shelters for all conditions could readily have been supplied on scows of that size, and certainly the absence of shelters can be attributed to no one but the "David P. Fleming's" operators.

The statements of the "David P. Fleming's" witnesses that there was nothing which lookouts on the scows could have done to avert the collision are silly. In the first place, if there had been a lookout on the first scow he could have seen to it that the scow's starboard light was burning brightly. Whatever the reason was why that light was not displayed to the "Koyei Maru", that reason could have been determined by a lookout and the condition rectified. Secondly, it is obvious that if there had been lookouts on the first and second scows, or upon either of them, such lookouts could have discharged flare-ups, flashed lights or made sound signals from the respective scows, which would certainly have advised the "Koyei Maru" that something was immediately ahead of her. Ac-

cording to the testimony of the "David P. Fleming's" witnesses they saw the "Koyei Maru" rounding the breakwater and headed toward the scows five or six minutes before the collision. Certainly if some display had been made from either or both of the first two scows at that time, or within two or three minutes thereafter, the "Koyei Maru" would have had ample warning of their presence.

Lastly, if there had been a lookout on the second scow he could have seen that the "Koyei Maru" was going to run over the tow line between it and the first scow, and he could have cut the line, allowing the "Koyei Maru" to pass free between them. Then the only result of the incident would have been a little trouble in passing a new line, and inconsequential expense. The evidence shows what the "Koyei Maru" actually struck was the tow line, 50 feet or more forward of the second scow ,and that the collision between the vessels was undoubtedly due to the pressure on the tow line, pulling the second scow against the port side of the "Koyei Maru".

The courts have frequently recognized that dictates of prudence require lookouts upon scows and barges in tow, particularly on long tows, and have imposed fault for failure to have them.

In *The America,* 102 Fed. 767, a tug with three scows in tow brought one of the tows into collision with an anchored vessel. Both the tug and tow were held in fault, the latter for failure to have a lookout and for failure to

avoid the collision by cutting her hawser. The court said of the tow which participated in the collision:

> "If she had maintained vigilant observation, she could have discovered the Suzanne before the tug changed her course to port, and there would have been time to permit her hawser to be cut, even if no other means of avoiding a collision were practicable. There would have been time to do this when the tug went to port. At that time it would have been apparent to those in charge of the Indian Ridge, if they had used their faculties, that unless some effective measure was immediately taken she would be carried by the tide and the course of the tug against the Suzanne. A tow on so long a hawser, navigating a much frequented channel, where water craft of all descriptions, moving and lying by, are liable to be encountered, should be provided with the means of severing her hawser in case of an emergency rendering that necessary. Whether the Indian Ridge was thus equipped does not appear. If she was not she should have been, and if she was she incapacitated herself from using them by her own neglect. She did not see the Suzanne until it was too late to cut a hawser or do anything else to avoid her. The failure to have a lookout by a tow may, under some circumstances, be culpable (The Virginia Ehrman and The Agnese, 97 U. S. 315, 24 L. Ed. 890), and we think the present to be one of the cases in which it should be held to be so. Tows, like other vessels, must exercise ordinary skill and vigilance, and, while being navigated in greatly frequented waters, are bound to use care and precautions commensurate with the increase of risk of collision from the greater number of craft likely to be met. *A tow, using in such waters a hawser one-sixth of a mile long, ought to anticipate that contingencies of navigation may require her to*

rely on her own precautions for her own safety and the safety of other vessels, and not depend exclusively upon those which may be exercised by the tug." (p. 768.)

On a number of occasions, vessels in tow have been held in fault for being undermanned or when their crews were incompetent. In the case at bar, under circumstances which required that the tows be competently manned, they were not manned at all.

The Teaser, 229 Fed. 476.

The Viking, 201 Fed. 424;

The Gertrude, 118 Fed. 130.

Inability on the part of the units of a long tow to communicate with each other and with the tug has likewise been held to constitute a violation of the requirements of prudence inherent in such an adventure.

The Mt. Hope, 79 Fed. 119, affd. 84 Fed. 910.

C.

THE "DAVID P. FLEMING" WAS NEGLIGENT IN FAILING TO WARN THE "KOYEI MARU" OF THE PRESENCE OF THE THREE SCOWS IN TOW BY EARLIER USE OF HER SEARCHLIGHT.

According to the "David P. Fleming's" testimony, the danger of collision was apparent to the tug's master five or six minutes before the collision, and he attempted to warn the Japanese vessel by blowing three separate "danger signals" on the tug's air whistle. The first of these alleged signals was blown when the "Koyei Maru" rounded the breakwater, the second about a minute later

and the third a minute and a half later, at which time the tug turned on its searchlight and threw it upon the first scow.

The "Koyei Maru" did not hear any of the alleged danger signals, if they were in fact blown. Nevertheless, the testimony of the tug's master that he did blow the danger signals as early as five minutes before the collision shows that in his mind, at least, the danger of collision existed as soon as the "Koyei Maru" rounded the breakwater.

We submit that when he got no response to his first danger signal, reasonable precaution required the tug's master to make immediate use of any other means at hand to warn the approaching vessel. The perfectly obvious means was the searchlight, which he did ultimately use, but not until after his third danger signal, two and one-half minutes after the danger of collision was apparent to him.

On the course the "David P. Fleming" claims to have been following, her master must have known that his towing lights would not show, and that the "Koyei Maru" was entitled to every means of identification of the tow which the "David P. Fleming" could possibly give her. There can be no question that if the searchlight had been flashed upon the scows two or three minutes earlier than it actually was, the "Koyei Maru" would have promptly reversed her engines and the collision would have been averted. The tug master did not use his searchlight until 2:06 a. m., at least three minutes after he was fully aware of the imminent danger of collision. When he did use it, he directed it only against the first scow, and this, as we have seen, confirmed the false message already conveyed by the tug's improper after lights.

We suggest that under the circumstances a most reasonable means of notifying the "Koyei Maru" of the nature of the tow would have been for the master of the "David P. Fleming", as soon as he had reason to fear a collision, to have directed the beam of his searchlight on each of the three scows in succession.

We cannot impose upon the tug master a requirement of superhuman foresight, but it does seem clear that some sort of use of the searchlight two or three minutes earlier in the game was only reasonable under the circumstances. He was attempting a most hazardous bit of navigation under conditions which put the "Koyei Maru" at a tremendous disadvantage. His searchlight was such an obvious means of giving immediate warning of his situation that we cannot escape the conclusion that his failure to use it until 2:06 a. m. was a definite fault.

It has been said that the prayer for general relief is the most valuable prayer after the Lord's Prayer. The General Prudential Rule yields to none in value and importance. A navigator may adhere rigidly to every specific statutory requirement and prohibition, yet if he avoids those precautions which experience admonishes under given circumstances, he is a never ending source of peril to others of the craft. The "David P. Fleming" and her tow presented a situation of the utmost hazard and required the exercise of what the courts have called "the extremest care in the interests of common safety." Certainly, in the respects mentioned in this subdivision, the "David P. Fleming" was derelict in the performance of that high duty.

IV.

The Extent of the Presumption in Favor of the Trial Court's Findings.

We have examined with great care the recent opinions of the judges of this court in *The Ernest H. Meyer,* 84 Fed. (2d) 496, and in *Thomas v. Pacific S. S. Lines,* 84 Fed. (2d) 506, as to the status of the trial court's findings since the adoption of General Amiralty Rule No. 46½. From these opinions we understand it to be the rule in this circuit that an admiralty appeal remains a trial *de novo,* and the reviewing court still has its ancient power of reviewing the evidence and forming its independent judgment thereon. We further understand that the findings and conclusions of the trial court are not, upon appeal, to be regarded as "vacated", that they are entitled to respectful consideration by the appellate court, and that there is a presumption *prima facie* that they are correct. We further understand that in weighing the presumption, this court will adhere to the rule that upon contraverted questions of fact, the decision of the trial court in admiralty cases will not be disturbed unless clearly against the weight of evidence.

In determining the weight of the presumption in favor of the trial court's findings in the instant case, the following suggestions may be of assistance to the reviewing court:

No witness on behalf of the "Koyei Maru" testified in the presence of the court. The evidence for all of her officers and members of the crew had to be taken on deposition, and in the case of the first officer on interrogatories prepared in advance. The "David P. Fleming" had the

distinct advantage of giving all of its testimony in open court and after the testimony on the part of the "Koyei Maru" had been taken. The court had no opportunity to weigh the relative credibility of the witnesses on one side against that of the witnesses on the other.

When a case is tried in such a manner, the presumption in favor of the trial court's findings has far less weight than when the trial court has had opportunity to hear and see all the witnesses.

The manifest purpose of the Supreme Court in adopting Rule 46½ was to insure that the reviewing court would have before it, to aid it in determining the questions on appeal, the conclusions of the trial judge upon all contraverted questions of fact and of law. If the findings and conclusions are delivered by the judge himself, either in writing or orally, that purpose is fully accomplished. The purpose fails, in large part, when successful counsel are entrusted with the preparation of findings and the trial court signs them *pro forma.*

In the courts of this state and many others, the judges almost invariably rely upon successful counsel for the preparation of the findings and conclusions. It is a practice permitted by law and sanctified by long custom. Under such practice, it is only human nature for overworked judges to depend upon successful counsel to protect them from reversal and to give perfunctory or no consideration to the fairness or accuracy of counsel's draft, or to corrections suggested by the unsuccessful side.

Since the adoption of the Supreme Court rule requiring specific findings, that practice has invaded the admiralty

courts, and, we are satisfied, it was followed by the trial court in this case.

The rule whereby a presumption exists in favor of a trial court's findings in admiralty grew up in the days when trial courts wrote their own opinions, and their views on the case were their own views. The logic and propriety of the presumption when the findings are the court's own, are fully apparent, but we respectfully submit there is no basis for the presumption when the findings are not the court's, but those of partisan counsel.

In this case the court's own views were announced from the bench in the oral opinion appearing at page 597 of the Apostles. These pronouncements are entitled to full weight and respect as the due decision of a neutral trier of fact and law. The formal findings, we submit, are entitled to no such weight. They constitute the findings of counsel, not the findings of the court.

According to the formal findings the court signed, the "Koyei Maru" was in fault for practically everything but her bare existence, and the tug and tow were models of virtue. The barest comparison of the formal findings with the trial court's oral remarks from the bench shows how far from speaking the court's true mind are the formal findings.

Under these circumstances this court should apply the presumption to the oral pronouncements of the trial court to the fullest extent compatible with the substance thereof, but, except as therein confirmed, no presumption whatever should be indulged in support of the formal findings.

Certainly no presumption can exist in favor of the trial court's finding that the misleading stern lights of the "David P. Fleming" could not have contributed to the col-

lision. There is no conflict in the evidence upon which a finding on that issue could rest. The evidence is undisputed. It cannot be gainsaid that the range light was unscreened; that viewed from the stern of the tug it and the stern light on the house formed two lights vertically in line, and that at 2:06 a. m. those on the "Koyei Maru" saw them as two lights vertically in line. By rule of law, two lights vertically in line mean a single tow or a tow less than 600 feet long, and it is not denied or disputed that the "Koyei Maru's" master and officers so interpreted the lights which they saw at 2:06 a. m., and acted upon the message of the lights until 2:08 a. m. It is not and cannot be disputed that if the "Koyei Maru" had known the true situation at 2:06 a. m., it could have or at least might have avoided the collision. From these unchallengeable facts, it follows inevitably that the tug's defective lights not only could have, but in all probability did bring about the collision.

With her admitted fault in respect to her after lights, the "David P. Fleming" had the burden of showing, not that it *might not* have caused the collision, not that it *probably did not,* but that it *could not.* There is not a scratch of evidence to support the court's finding that it *could not.*

It is apparent that the underlying consideration which impelled the trial judge to exonerate the tug and hold the "Koyei Maru", was his own finding (stated in the oral opinion) that her navigator should have recognized the lights on the scows, particularly the light on the second scow, and should have done something to avoid them. Possibly the judge really had in mind the finding attributed to him by counsel, that the "Koyei Maru" should have

stopped and reversed her engines at 2:04 a. m., when the unidentifiable white lights were seen to port and starboard.

It is not our province to defend the conduct of the "Koyei Maru", but we feel that some comment on this phase of the evidence is advisable because of its relation to the matter of the "David P. Fleming's" fault in respect to the lights on the scows.

Failure to see a light is not a fault of itself. Neither is it a fault *per se* to see distant green lights *as white*. Fault lies if due diligence is not used to see a light which is capable of being seen, or to ascertain the true color of lights where that color is capable of being ascertained. The officers of the "Koyei Maru" cannot be condemned for not seeing what wasn't there.

There is not a scrap of evidence that in any respect the "Koyei Maru" failed in diligence in maintaining proper lookouts or in watching for lights. The finding, prepared by counsel, that the first officer on the forecastle head was engaged in other duties besides that of lookout cannot be supported by any fair construction of that officer's deposition or by any other evidence in the case. The only conclusion that can be drawn from the evidence is that at all times the "Koyei Maru" had four officers who were looking out with every faculty they had. Their minds and their full attention were constantly riveted upon the lights and upon what, if anything, was ahead of them. We confidently assert that no case will be found in the books holding that such conduct is negligent.

We again call attention to the trial court's evident failure to follow the testimony and arguments as to the significance of the various navigation lights, and again suggest that he did not understand their extent or limitations as instruments of information. That this misapprehension influenced his findings of fault against the "Koyei Maru" cannot be doubted.

Assuming that the court in truth believed that the "Koyei Maru" should have stopped her engines and reversed at 2:04 a. m., we may consider briefly whether there is any support for such a finding in the law or in the evidence.

Her officers saw a blur of light to starboard and two faint white lights to port. The character of the vessels and their courses, if any, were not ascertainable. The "Koyei Maru" was headed between the lights to starboard and those to port, and we now know that there was a space of approximately 2000 feet which appeared to be clear. On this evidence, the "Koyei Maru" slowed her engines from half speed to slow, kept vigilant lookout to port, ahead and to starboard, saw nothing ahead, and that the lights to port and starboard were respectively broadening on her beams. What conceivable support does that evidence give for a finding of negligence for failing to stop and reverse?

There is no rule of law or custom in navigation requiring a vessel to stop or reverse merely because she sees uninterpretable lights ahead of her. If that were the law,

no vessel would ever get in or out of a harbor. The Supreme Court said in *The Scotia,* 14 Wall. 170, 20 L. Ed. 822-824:

> "Was, then the Scotia in fault? If she was, the fault must have been either that she did not change her helm sooner, or that she ported, or that she was unjustifiably late in slackening her speed and reversing her engines. No other fault is imputed to her. We have already said that she was not bound to take any steps to avoid a collision until danger of collision should have been apprehended, and we think there was no reason for apprehension until the ship's light was seen *closing in upon her.* Assuming for the present that she had no right to conclude that the light was on a steamer and to maneuver accordingly and, therefore, that it was her duty to keep out of the way, it is still true that all her duty at first was to watch the light in order to discover certainly what it was, and to observe its course and notice whether it crossed her own course. It is not the law that a steamer must change her course, or must slacken her speed the instant she comes in sight of another vessel's light, no matter in what direction it may be. With such a rule navigation cannot be conducted. Nor is such a rule necessary to safety."

At 2:04 a. m. the "Koyei Maru" followed exactly the precepts thus laid down by the Supreme Court. She watched the light. She went even further than the rule requires and slackened her speed. The lights did not "close in upon her". On the contrary, they broadened, negativing rather than suggesting the idea that any risk of collision existed.

In the oral opinion, the trial court stated:

> "It seems to me, however, that a conclusion in favor of the Fleming is forced upon the court, because I see no reason to disregard or disbelieve the evidence that the last two tows were properly lighted. The first one might not have been. The preponderance of evidence, however, I think obviously shows that it was lighted."

We concede that there was evidence from which the court was justified in finding that the light on the first scow was *lighted,* but we are satisfied, from the evidence discussed in the second subdivision hereof, that that is as far as the trial court or this court would be justified in going. The question is, not was it lighted, but was it visible? On that point the great preponderance of evidence is that it was not.

As to the respects in which the "David P. Fleming" and her tow violated the duty of extreme care imposed upon her operators and navigator, the trial court made no mention, and if we clearly interpreted his mind, he considered them of no importance in the absence of a specific rule prohibiting the use of long tows.

We suggest that these considerations, as well as others apparent from the record, carry the case to that point beyond which the reviewing court must "assume responsibility for the facts."

The Ariadne, 13 Wall. 475, 20 L. Ed. 542;

The Ernest H. Meyer, 84 Fed. (2d) 496-501.

Conclusion.

We therefore submit the cause of the cargo interests, confident that from an independent review of all the evidence, it will be apparent to this court that the operators of the "David P. Fleming" and her tows should be held for fault contributing to this collision in the respects herein discussed; that the decree dismissing the libel in the cause brought by the Pacific Vegetable Oil Company, *et al.,* against the Wilmington Transportation Company should be reversed, and that this court should order an interlocutory decree in favor of those libelants, with the usual reference to determine their damages.

Respectfully submitted,

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